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IN THE

Supreme Court of the United States

October Term, 1958.

No. 810

ARCHBOLD van BEUREN, et al.,
Petitioners,

v.

MARTIN M. McLOUGHLIN (Former Acting Collector of Internal Revenue), et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Archbold van Beuren, Hugh Eustis Paine and J. Wallace Winslow, Executors of the Estate of Mary A. van Beuren, Deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in *Archbold van Beuren, et al. v. Martin M. McLoughlin, (Former Acting Collector of Internal Revenue), et al.*, on December 12, 1958.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Rhode Island (53a),[1] is reported at 161 F. Supp. 944. The opinion of the Court of Appeals affirming the District Court is printed in Appendix B, *infra* page 20, and is reported at 262 F. 2d 315. The opinion of the Court of Appeals denying petitioners' petition for rehearing is printed in Appendix D, *infra* page 31, and is reported at 262 F. 2d 315, 321.

1. This and similar references are to page numbers of petitioners' Appendix filed with the Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix C, *infra* page 30, was entered on December 12, 1958. A petition for rehearing, timely filed on December 29, 1958, was denied January 6, 1959. The order denying the petition for rehearing is printed in Appendix E, *infra* page 32.

Petitioners invoke the jurisdiction of this Court under Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Where a trust instrument conferred a power of amendment on persons *other than* the settlor, i.e., on the trustees and adult income beneficiaries, was the court below justified in holding that the settlor had at the time of her death the "power . . . alone or in conjunction with any person, to alter, amend or revoke" the trust (within the meaning of Section 811(d)(2) of the Internal Revenue Code of 1939) solely by reason of the settlor's right under another provision of the trust instrument to remove and appoint trustees?

2. Even if the settlor had a power of amendment in the statutory sense, was it a reserved power or, alternatively, a power conferred on her and therefore outside the scope of Section 811(d)(2) as interpreted in *White v. Poor*, 296 U. S. 98 (1935), where the source of the settlor's right to remove and appoint trustees as it existed at the time of her death was an instrument executed by the trustee and adult income beneficiaries many years after the creation of the trust?

STATUTES AND REGULATIONS INVOLVED.

The controlling statutory provision is Section 811(d)(2) of the Internal Revenue Code of 1939, 26 U. S. C. § 811(d)(2), printed in Appendix A, *infra* page 15. The regulations involved are Treasury Regulations 105, Section 81.20, 26 *Code Fed. Regs.* § 81.20 (1949). The pertinent part thereof is printed in Appendix A, *infra* page 16.

STATEMENT OF THE CASE.

A. The Nature of the Proceeding.

This is a suit for refund of federal estate tax paid by petitioners as Executors of the Estate of Mary A. van Beuren, who died February 25, 1951, a resident of Rhode Island. On April 19, 1932 the decedent had created an irrevocable inter vivos trust with Fiduciary Trust Company of New York as trustee. The terms of the trust instrument and the subsequent history of the trust are summarized hereinafter.

The Commissioner of Internal Revenue determined that a portion of the value of the trust was includible in the decedent's gross estate on the ground that, in respect of so much of the trust, the decedent had at the time of her death a power of amendment falling within the scope of Section 811(d)(2) of the Internal Revenue Code of 1939. The petitioners, having paid the resulting deficiency and filed claims for refund, which were disallowed, brought this suit for refund against the officials of the Internal Revenue Service to whom the disputed tax had been paid. The District Court entered judgment adversely to the petitioners (the plaintiffs below) on the issue of includability of a portion of the 1932 trust in gross estate [2] and the Court of Appeals affirmed.

B. The Facts With Respect to the Trust.

All material facts not admitted were stipulated in the District Court. The essential facts with respect to the trust of April 19, 1932 are as follows:

The trust indenture provided for the payment of the trust income in equal shares to the decedent's husband, her

2. Certain other issues were stipulated in favor of the petitioners, with the result that they obtained judgment against one of the defendants for a portion of the amount of their claim.

son and her daughter-in-law or the survivor of them, with contingent income beneficiaries designated to take in the event that all three primary beneficiaries should die during the trust term (21a-23a).

The trust was to continue until the death of the survivor of the decedent and her husband, at which time the corpus was to be paid to the decedent's son, if living, otherwise as he might appoint by will. Takers in default of appointment were named (23a-24a).

It was provided in Article Sixteenth of the trust indenture that the trust might be changed or amended "with the consent of the Trustee and the adult Beneficiaries or adult Beneficiary then receiving the income by an instrument in writing duly executed by the Trustee and such Beneficiary or Beneficiaries." It was further provided that no such amendment should effect a revocation in whole or in part or alter the provision for distribution upon termination (30a).

Under Article Nineteenth of the trust indenture the decedent reserved the right at any time to remove any trustee and appoint a successor (31a). The decedent never exercised this right.

Questions pertaining to the validity, construction and administration of the trust were, by the terms of the trust indenture, to be determined in accordance with New York law (29a).

The trust instrument was amended on two occasions. On July 30, 1932 the trustee and income beneficiaries, acting under Article Sixteenth, executed an amending instrument (39a) the terms of which are without significance for present purposes. Again on December 30, 1946 the same persons executed a "Second Supplemental Indenture" (43a) under which the office of individual co-trustee was created and certain related changes made in the terms of the trust indenture.

Paragraph 4 of the 1946 instrument commenced as follows (47a):

> "4. Article NINETEENTH shall be amended to read as follows:"

Immediately below there was set forth the complete text of Article Nineteenth in amended form. In its opinion the Court of Appeals characterized the changes in Article Nineteenth made by the trustee and income beneficiaries as "those necessary to accomplish the purpose of the 1946 amendment—that is, to transfer from the grantor to a newly created individual co-trustee the powers over investments" (*infra* p. 29). The language of reservation to the settlor of the right to remove trustees and appoint successors was retained with minor change in phraseology.

The amount which the Commissioner of Internal Revenue determined to be includible in gross estate in respect of the trust represented the value of the income from the trust for the duration of the trust. This value was stipulated.

C. Decisions of the Courts Below.

The District Court interpreted Article Sixteenth of the trust indenture as reserving a power of amendment to the decedent by implication, such power being exercisable by her with the consent of those persons specifically mentioned in Article Sixteenth, i.e., the trustee and adult income beneficiaries (60a). The District Court therefore found it unnecessary to consider the decedent's right of removal and appointment of trustees under Article Nineteenth.

The Court of Appeals, stating that it was "not certain of the correctness of the foregoing ground taken by the district court" (*infra* p. 23), rested its affirmance on the government's alternative argument that the decedent, acting under Article Nineteenth, might have made herself a

trustee and in that capacity shared the power of amendment under Article Sixteenth, and that this combination aggregated a power in her "... in conjunction with any person, to alter, amend or revoke" the trust within the meaning of Section 811(d)(2). In so holding the Court of Appeals rejected the petitioners' arguments, first, that the decedent's rights under the trust instrument fell short of constituting a Section 811(d)(2) power of amendment, and, second, that even if the decedent had a power of amendment by reason of her right to remove and appoint trustees, that right was one which at the time of her death was a *conferred* right and not a *reserved* right and under the doctrine of *White v. Poor, supra,* was outside the scope of Section 811(d)(2).

REASONS FOR GRANTING THE WRIT.

I. The Determination Whether the Decedent Had a "Power, Either . . . Alone or in Conjunction With Any Person" to Amend the Trust Presents a Question of Importance in the Administration of the Federal Estate Tax Laws Which Has Not Been, But Should Be, Settled by This Court.

In the instant case the trustees and other persons of whom the decedent was not one had the power to amend the trust. The decedent had merely the right to remove and appoint trustees. The Government nevertheless argued, and the Court of Appeals agreed, that she had a "power, either . . . alone or in conjunction with any person, to alter, amend or revoke" the trust within the meaning of Section 811(d)(2) of the Internal Revenue Code of 1939, applicable to transfers on or prior to June 22, 1936. Section 811(d)(1), applicable to transfers after that date, is identical with 811(d)(2) in the respect quoted. Moreover, both 811(d)(1) and 811(d)(2) were carried over without change into the Internal Revenue Code of 1954 and appear therein as Section 2038(a)(1) and (2), respectively. Thus, the question here has continuing significance in the area of federal estate tax.

Clearly the decedent had no power of amendment in herself alone. The precise question is rather whether she had such a power "in conjunction with" the trustees and adult income beneficiaries. The Court of Appeals held that she did. It is submitted that this decision is erroneous.

Petitioners' position in essence is that since the decedent was never in fact one of the persons sharing the power of amendment under Article Sixteenth and since she had no assurance at any time of being able to bring herself within that class of persons, she cannot be said to have had a "power" of any sort in respect of trust amendments.

To the extent that there was a possibility that, acting under Article Nineteenth, she might have made herself a trustee eligible to participate in an amendment under Article Sixteenth,[3] it was a possibility which existed at sufferance of the others and which they might have cut off at any time without her consent by an appropriate amendment to Article Nineteenth.

Addressing itself to the petitioners' argument, the Court of Appeals stated (*infra* p. 21):

> ". . . . Assuming for the moment that Article Nineteenth is subject to amendment in the manner just suggested, the fact of the matter is that at the date of the grantor's death Article Nineteenth had not been so amended. Furthermore, if it is necessary that the named trustees and beneficiaries forbear from exercising this power of amendment under Article Sixteenth, it seems to be only another kind of requirement for the

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3. One of the questions raised in and considered by the court below was whether under New York law the decedent could appoint herself a trustee.

Article 5 of the New York Real Property Law (Real Property Law, § 130 *et seq.*), which applies to personal property as well as real property, *Matter of Mochring*, 154 N. Y. 423, 48 N. E. 818 (1897), contains comprehensive provisions governing the "creation, construction and execution of powers . . ." (§ 130). All powers are "either beneficial or in trust" (§ 133). A power is beneficial only under certain specified circumstances, i.e., "where no person, other than the grantee, has, by the terms of its creation, any interest in its execution" (§ 136). Powers reserved by the grantor "shall be subject to the provisions of this article, in the same manner as if granted to another" (§ 144).

The New York cases go so far as to indicate that the power to appoint a substitute trustee is a power in trust, *Matter of Walsh*, 147 Misc. 281, 264 N. Y. S. 72 (Sur. Ct. 1933), and that a power in trust cannot be exercised for the benefit of the holder of the power. *Stanley v. Payne*, 65 Misc. 77, 82, 119 N. Y. S. 570, 575 (Sup. Ct. 1909). Apparently there is no New York decision involving the precise question whether a person holding a power to appoint a trustee may name himself to act in that capacity. This question was before the Court of Appeals for the Tenth Circuit in *Loughridge's Estate v. Commissioner*, *infra* p. 10, and was decided by the majority

concurrence of other persons, which the Congress has made irrelevant. See *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 90 (1935)."

The first sentence quoted begs the question. It is true that the decedent's right to remove and appoint trustees had not been amended out of Article Nineteenth at the time of her death but it is equally true that she had not availed herself of that right so as to acquire the power to participate in amendments. It is only insofar as that right might have been availed of by her as a stepping-stone toward acquiring a power of amendment under Article Sixteenth that its existence is material.

In the second sentence above quoted the Court of Appeals falls into what petitioners believe to be a fundamental error in interpretation of the language "in conjunction with any person" appearing in Section 811(d)(2). A power of amendment exercisable by the settlor "in con-

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in the affirmative. However, in so holding, the majority emphasized that the settlor there (unlike the settlor in the case at bar) had been one of the original trustees and so presumably did not intend to preclude the possibility of reappointing himself as trustee. The dissenting judge, on the other hand, expressed sincere doubt whether New York law would have permitted the settlor to reappoint himself as trustee.

In the case at bar the Court of Appeals sought to overcome the force of the dissent in *Loughridge's Estate* by observing that the decedent, who had the right under Article Nineteenth to fix the compensation of her appointees, could have appointed herself to serve as trustee without compensation. However, since she could renounce compensation in any event, her right to fix compensation would appear to be without present significance.

Petitioners do not seek certiorari on the ground of a misinterpretation of New York law since in the absence of New York cases in point it cannot be definitely stated that there has been such a misinterpretation. Petitioners do, however, emphasize that at the time of the decedent's death there was a substantial, unresolved legal question as to the decedent's power to appoint herself a trustee. Petitioners contend that the existence of this question, without more, necessarily rendered the requirement that the decedent first make herself a trustee before she could acquire a power of amendment something more than the "technical, preliminary step" which it was characterized as by the Court of Appeals (76a).

junction with any person" admits of only a limited number of factual situations. These situations may be expressed in distilled form as follows:

(a) A trust is amendable by the joint action of the settlor and A.

(b) A trust is amendable by the settlor with the consent of A.

(c) A trust is amendable by A with the consent of the settlor.

It is apparent that unless something is required of the settlor in order to effect an amendment, albeit merely his consent thereto, the words of the statute "in conjunction with" are not satisfied. The settlor cannot be said to have a power exercisable "in conjunction with" another person unless some degree of participation on his part is required. At the very least, the settlor must have the power to refuse to permit a proposed amendment or, stated in another way, a *veto power* in respect of amendments. In the case at bar the decedent had neither a power of amendment nor even the power to veto action by the trustees and adult income beneficiaries to strip her of her one possibility of acquiring a power of amendment through the exercise by her of her right of removal and appointment of trustees. Having no veto power over the action of the persons having the power of amendment, the decedent cannot be said to have herself had a power of amendment "in conjunction with any person". The contrary view, entertained by the Court of Appeals, indulges an unwarranted extension of the statutory language.

We know of no decided case holding that a settlor had a power of amendment, as defined in Section 811(d)(1) or (2) or a predecessor or successor statutory provision, where the settlor did not at least have a veto power over amendments. In the case at bar the Court of Appeals has cited *Loughridge's Estate v. Commissioner*, 183 F. 2d 294 (10th

Cir., 1950), *cert. denied* 340 U. S. 830 (1950), but that case, superficially similar to the case at bar, is seen on analysis to be clearly distinguishable. There, as here, the settlor had the power to remove and substitute trustees and the trustee in turn had a power of the 811(d)(2) variety. However, the power in *Loughridge* was the power to *terminate* the trust and since the trustee could have frustrated the settlor from making himself trustee and succeeding to that power only by terminating the trust, it could accurately be stated that the settlor had the absolute power to terminate the trust. In the case at bar the decedent might have been prevented from making herself a trustee by an amendment to the trust of an administrative nature clearly without significance for estate tax purposes.[4] Consequently, to impute to the decedent the power to effect such an amendment does not justify the conclusion that the decedent had a power of amendment within the meaning of Section 811(d)(2).

In summary, Section 811(d)(2) clearly requires for its application that the settlor have, at the time of his death, at the very least the absolute power to veto any alteration, amendment or revocation of the trust. The decedent in the instant case had no power to participate in the amendment of the trust at the time of her death and had no power to veto any amendment, including an amendment designed to eliminate permanently the possibility of her acquiring such a power. The holding of the Court of Appeals that she nevertheless had a "power, either . . . alone or in conjunction with any person, to alter, amend or revoke" the trust is so unsupported by statutory language and by judicial precedent and so far-reaching in its implications in the administration of the federal estate tax that it should be reviewed by this Court under the exercise of its certiorari powers without awaiting a conflict with another circuit.

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4. A power to remove and appoint trustees is not a Section 811(d) power of amendment. *Estate of C. Dudley Wilson*, 13 T. C. 869 (1949), *aff'd per curiam* 187 F. 2d 145 (3rd Cir., 1951). Neither, by the same token, is a power to divest a person of such a power.

II. The Decision of the Court of Appeals Is in Direct Conflict With the Decision of This Court in White v. Poor, 296 U. S. 98 (1935).

In the Court of Appeals, as in the District Court, petitioners argued that even if the decedent had a power of amendment at the time of her death it was not a *reserved* power and therefore not within the scope of Section 811(d)(2) as interpreted by this Court in *White v. Poor*, *supra*.[5]

White v. Poor involved a trust in which the settlor had conferred a power of termination on the trustees and had made herself one of the original trustees. At a later date the settlor resigned as trustee and the remaining trustees, who had the power to fill vacancies with the approval of the beneficiaries, appointed the settlor's daughter as trustee in her place. When the daughter in turn resigned at the end of one year the settlor was reappointed as trustee. She continued in that capacity until her death.

This Court held that the settlor did not have a power of termination under the statutory definition at the time of her death. The Court stated:[6]

> "She then acquired any power for the future to participate in a termination of the trust, solely by virtue of the action of the other trustees and the beneficiaries and not in any sense by virtue of any power reserved to herself as settlor in the original declaration of trust. We think, therefore, that neither technically nor in substance does the power to terminate as it existed from 1921 to the date of Mrs. Sargent's death fall within § 302(d)."

In the case at bar the decedent's right of removal and appointment of trustees, as it existed at the time of her

5. *White v. Poor* arose under Section 302(d) of the Revenue Act of 1926, which was carried over into Section 811(d)(2) of the 1939 Code.

6. 296 U. S., p. 102.

death under Article Nineteenth of the trust indenture, traced back to the language of the Second Supplemental Indenture executed by the trustee and income beneficiaries on December 30, 1946. Paragraph 4 of the Second Supplemental Indenture substituted a new and amended Article Nineteenth for the corresponding Article in the original trust indenture.

The Court of Appeals has sought to avoid the application of *White v. Poor* by arguing that the original Article Nineteenth was not in terms *repealed* but was only *amended*, and that since it was not amended so as to delete the decedent's right of removal and appointment of trustees, that right continued to be a reserved right outside the protection of *White v. Poor*.

It is submitted that the application of *White v. Poor* must depend on the legal effect of paragraph 4 of the Second Supplemental Indenture rather than on the use of the word "amend" in lieu of "repeal". On the facts here, the distinction between a purported repeal of Article Nineteenth (coupled with its re-creation in revised form) and a purported amendment of Article Nineteenth, constitutes a wholly unrewarding exercise in semantics. What happened was that the trustee and income beneficiaries republished Article Nineteenth in its entirety, making those changes which they desired to make and adopting as their own that language which they did not desire to change. Any subsequent exercise by the decedent of her rights under Article Nineteenth would have been referable solely to the authority conferred on her by the Second Supplemental Indenture and there would have been no reason or justification for referring back to the language of the original Article Nineteenth. The Court of Appeals has not met this point in its opinion. Certainly, the fact that the decedent's rights at the time of her death in respect of the removal and appointment of trustees were virtually the same as those originally reserved by her does not meet the point: that was true of the right of termination held by the settlor in

White v. Poor. *White v. Poor* requires that there be determined the *source* of the power as it existed at the decedent's death, and here the *source* of the power was the Second Supplemental Indenture to which the decedent was not a party. Hence under *White v. Poor* she did not have a reserved power of amendment at the time of her death (assuming she had such a power at all) and Section 811(d)(2) cannot have application.

CONCLUSION.

For the foregoing reasons it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Internal Revenue Code of 1939.

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(d) Revocable Transfers.—

(1) Transfers After June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contem-

plation of his death, except in case of a bona-fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(3) Date of Existence of Power.—For the purposes of this subsection the power to alter, amend or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

. . .

Treasury Regulations 105.

Sec. 81.20. Transfers with power to change the enjoyment.—(*a*) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or

persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811(d)(1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivison was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d)(1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

(*b*) *Taxability.*—The property or any interest therein transferred as described in subsection (a) shall be included in the gross estate if it comes within any one of the following paragraphs:

(1) If the transfer was made prior to the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and to the extent of any adverse interest which was not substantial.

(2) If the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p.m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

(3) If the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936), and the power was either reserved at the time of the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in con-

junction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this and in the next succeeding section, the expression "reserved at the time of the transfer" refers to a power to which the transfer was subject when made, whether the power arose by implication of law or by the express terms of the instrument of transfer, and which continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in connection with the making of the transfer that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time which had not arrived, or the happening of a particular event which had not occurred, at decedent's death. In determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See section 81.10(i)(3).)

The provisions of this section do not apply to a transfer if the power may be exercised only with the consent of all parties having an interest, vested or contingent, in the transferred property, and if the power adds nothing to the rights of the parties as conferred by the applicable local law.

APPENDIX B.

Opinion of the Court Below.

December 12, 1958.

MAGRUDER, *Chief Judge.* Appellants are executors of the estate of Mary A. van Beuren, a resident of Rhode Island, who died in 1951. Upon examination of the estate tax return filed by the executors, the Commissioner assessed deficiencies in estate tax, one of which was based upon his determination that there should have been included in decedent's gross estate, pursuant to § 811(d)(2) of the Internal Revenue Code of 1939, the value at the date of her death of the income to be derived from a certain inter vivos trust established by decedent on April 19, 1932. The executors paid the assessed deficiencies and filed claims for refund, which the Commissioner denied on March 7, 1957. Thereafter, the executors duly filed the present complaint in the United States District Court for the District of Rhode Island seeking recovery of the sums asserted to be due in the claims for refund. Named as defendants were the former Acting Collector of Internal Revenue and the District Director of Internal Revenue.

As to certain items, the Commissioner conceded that the plaintiffs were entitled to a refund; and so the district judge gave judgment for the plaintiffs in the sum of $68,235.39, which was the total of the conceded items. But the Commissioner maintained the correctness of his determination as to the inclusion of the trust income, the one issue now in dispute, and the district judge, agreeing with the Commissioner, refused to give plaintiffs judgment for the greater amount claimed in their complaint, and entered a judgment dismissing the complaint "as to any relief in excess of the sum of $68,235.39, together with interest, as provided by law". The plaintiff executors then took the present appeal from the aforesaid judgment.

In enacting § 811(d)(2), the Congress was concerned to prevent an avoidance of the estate tax by the device of creating an inter vivos trust that purported to give away an interest, but where the grantor reserved in his own hands certain threads of control which rendered the gift in effect ambulatory until the date of the grantor's death.

Section 811(d)(2) is sweeping and perhaps ruthless in its application. It does not depend upon finding a motive of tax avoidance. Nor does it depend upon whether the grantor ever attempted to exercise the power; it is the existence of the power, not its exercise, that is important. Nor does it matter that the power is reserved to the grantor not in his capacity as grantor but only in a fiduciary capacity. See *Welch v. Terhune*, 126 F. 2d 695 (C. A. 1st, 1942), cert. denied 317 U. S. 644 (1942). And, as we held in *Chickering v. Commissioner*, 118 F. 2d 254 (1941), cert. denied 314 U. S. 636 (1941), it does not matter that the reserved power of amendment is a limited power under which the grantor in no event could revest in herself the donated interest but could only apportion the trust income and corpus among her children or disinherit them wholly or in part, in favor of other persons. Nor does it matter, so far as the estate tax is concerned, that the described power is reserved by the grantor only in conjunction with the consent of some other person, whether or not that other person has some interest in the trust adverse to the exercise of the power. Cf. *Higgins v. Commissioner*, 129 F. 2d 237, 239 (C. A. 1st, 1942), cert. denied 317 U. S. 658 (1942). As explained in *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 90 (1935):

> "The purpose of Congress in adding . . . to the section as it stood in an earlier act was to prevent avoidance of the tax by the device of joining with the grantor in the exercise of the power of revocation someone who he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor's immediate family

might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate. Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process."

This brings us to a consideration of the terms of the trust indenture created by the decedent in 1932. In that trust Mrs. van Beuren conveyed certain enumerated personal property, consisting of stocks and bonds, in trust to the Fiduciary Trust Company of New York. At the time of her death the corpus of the trust was valued at $6,278,445.13. It is conceded, however, that the value of the corpus is not includible in her gross estate, since the only power of amendment in the trust was limited by a proviso "that no . . . change or amendment shall effect any revocation, in whole or in part, of the trust hereby created or alter the provision for distribution upon the termination of the trust"; and there was no provision for anticipatory payment of principal. See *Commissioner v. Bridgeport City Trust Co.*, 124 F. 2d 48 (C. A. 2d, 1941), cert. denied 316 U. S. 672 (1942); *Estate of Albert E. Nettleton*, 4 T. C. 987 (1945). The only question before us is the propriety of inclusion of the value of the income of the trust, which is agreed to be $[illegible].84, pursuant to the requirements of § 811(d)(2) of the 1939 Code, which provides in relevant part:

"Sec. 8.11. Gross estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of

his death of all property, real or personal, tangible or intangible . . .

(d) Revocable transfers . . .

(2) Transfers on or prior to June 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. . . ."

The trust contained the following provision for amendment:

"Sixteenth: This agreement or any of the terms thereof may be changed or amended during the life of the trust with the consent of the Trustee and the adult Beneficiaries or adult Beneficiary then receiving the income by an instrument in writing duly executed by the Trustee and such Beneficiary or Beneficiaries. Provided, however, that no such change or amendment shall effect any revocation, in whole or in part, of the trust hereby created or alter the provision for distribution upon the termination of the trust. . . ."

The district judge construed the word "consent" in this language of Article Sixteenth as meaning "that the trust agreement or any of its terms could be amended by the decedent grantor if consent thereto was first given by the trustee and the adult beneficiaries or beneficiary. In other words, it was amendable by the decedent as grantor with their consent."

Because we are not certain of the correctness of the foregoing ground taken by the district court, we prefer to rest our affirmance of the judgment upon an alternative argument which the government made in the district court and before us, but which the district court in the view it took found it unnecessary to consider. See *Helvering v. Gowran*, 302 U. S. 238, 245 (1937).

This alternative argument advanced by the government, which we deem to be persuasive, is based upon reading Article Sixteenth in conjunction with a provision in Article Nineteenth of the trust.

The full text of Article Nineteenth is as follows (words deleted by an amendment adopted in 1946 are given in brackets; words added by the 1946 amendment are italicized):

> "Nineteenth: *There shall be two Trustees hereunder, one of which shall be an individual and one a corporation qualified to act in such capacity under the laws under which it was created and exists. In the first instance the individual Co-Trustee shall be designated by the Grantor by an instrument under her hand and seal, acknowledged in like manner as a deed to be recorded in the State of New York, and the corporate Co-Trustee shall be the Trustee first above named herein.*
>
> The Grantor reserves the right at any time by an instrument under her hand and seal, acknowledged in like manner as a deed to be recorded in the State of New York, to remove [the Trustee or] and [other] Trustee [or Trustees] hereunder from the trusteeship hereunder and to appoint a new Trustee or Trustees in the place of the Trustee or Trustees so removed, and thereupon the Trustee, or Trustees so removed shall by proper transfer and delivery vest the trust property in the Trustee or Trustees so appointed. Thereafter such successor or successors shall have all the rights, powers and duties which were granted to or imposed upon the Trustee or Trustees so removed under the provisions of this indenture. Upon making any appointment of a new Trustee, the Grantor may make such provision as she shall think fit in respect to the compensation of the Trustee or Trustees appointed and their successors in office or any of them and *shall* provide for the payment of any such com-

pensation, whether out of the capital or income as to the [Grantor] *Trustees* may seem proper. Upon the death of the Grantor the foregoing power of removal and appointment shall vest in Archbold van Beuren for the remainder of the trust term."

The grantor thus reserved an unrestricted (although unused) power to remove a trustee and replace him. This is an extremely potent power, even if she could not substitute herself, as the Tax Court pointed out in *Warren H. Corning*, 24 T. C. 907, 915 (1955):

> "[P]etitioner could substitute an independent corporate trustee after first ascertaining that such trustee would follow his directions. Should this corporate trustee subsequently fail to follow his instructions, petitioner could then replace it with another. Petitioner's power to substitute trustees was subject to no restrictions and, in practical terms, gave him the broad powers possessed by the trustee."

We are unaware of any New York case indicating whether in this situation the grantor would have had the power to make herself a trustee. In the absence of any restriction to that effect, it seems likely that the grantor could have appointed herself, and counsel for the taxpayers conceded to the court in oral argument that she could have.

It does not seem to us to be significant, in the context of § 811(d), that the power to alter or amend would require the grantor to take two steps, instead of one, for its exercise; that is to say, that the grantor would have first to exercise the power under Article Nineteenth to remove a trustee and substitute herself as trustee, and then, under Article Sixteenth, would have power, as trustee, to alter or amend the terms of the trust in conjunction with other persons. In this connection we note another provision of § 811 of the 1939 Code. In § 811(d)(3) (53 Stat. 121) it is provided:

"For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. . . ."

The requirement that a technical, preliminary step be taken to make the grantor a trustee, if she had an unrestricted power to do so, seems but a requirement of notice by another name, and equally to be disregarded.

Apparently the only case directly in point is *Loughridge's Estate v. Commissioner*, 183 F. 2d 294 (C. A. 10th, 1950), cert. denied 340 U. S. 830 (1950). The trust instrument involved in that case provided "that upon written notice from the decedent, the trustee should resign; that such resignation should become effective on the day specified in the notice which should not be less than thirty days after delivery of the notice; that in case of the resignation of the trustee, the [grantor] . . . should have the power to appoint a successor trustee". (*Id.* at 297) Moreover, the trustee, as such, had power to terminate the trust in whole or in part at any time. The court held that the power to terminate was in effect a power reserved to the grantor, since he could have substituted himself as trustee and then, as trustee, have determined the respective rights of the beneficiaries. It therefore held that the value of the trust was includable in the grantor's gross estate under § 811 (d)(2). The dissenting judge was troubled primarily by his doubt that under the New York law the grantor could have effectively substituted himself as trustee (an issue which is conceded in this case) and by the requirement that at least thirty days must elapse before the removal of a

trustee should become effective (a factor which is not present in this case).

We do not think that the decision in *Loughridge's Estate v. Commissioner* can be distinguished on the argument that the power of the grantor in the present case to remove the trustee and substitute herself was subject to the power in Article Sixteenth whereunder the named trustees and present income beneficiaries, acting together, could amend Article Nineteenth so as to eliminate the grantor's unrestricted power to remove a trustee.* Assuming for the moment that Article Nineteenth is subject to amendment in the manner just suggested, the fact of the matter is that at the date of the grantor's death Article Nineteenth had not been so amended. Furthermore, if it is necessary that the named trustees and beneficiaries forbear from exercising this power of amendment under Article Sixteenth, it seems to be only another kind of requirement for the concurrence of other persons, which the Congress has made irrelevant. See *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 90 (1935).

A second argument by appellants to avoid the effect of this two-step power in the grantor is that such power was not "reserved" by the grantor, citing *White v. Poor*, 296 U. S. 98 (1935).

In *Welch v. Terhune*, 126 F. 2d 695, at 698, we explained the decision of the Supreme Court in *White v. Poor* as follows:

> "*White v. Poor*, 1935, 296 U. S. 98, 56 S. Ct. 66, 80 L. Ed. 80, was a peculiar case. There the settlor conveyed property to three trustees, one of whom was herself. It was provided that the trust might be terminated at any time either in whole or in part 'by the

* It is to be noted that this argument assumes the incorrectness of the district judge's interpretation of Article Sixteenth, since obviously, if the grantor's initiative were required for an amendment to be effective, the trustee and beneficiaries would have no power, without the consent of the grantor, to amend Article Nineteenth by eliminating the grantor's power to remove a trustee.

person or persons who shall then be trustees hereunder'. A year later the settlor resigned as trustee and her daughter was appointed to fill the vacancy. Afterwards the daughter resigned and the settlor was reappointed trustee under a clause of the trust instrument providing that vacancies could be filled by the remaining trustees with the approval of the beneficiaries. The settlor then continued as a trustee until her death. One of the alternative grounds upon which the majority opinion was rested was that the power which the settlor had at the date of her death did not fall within the terms of § 302(d) of the applicable Revenue Act of 1926. The significant and distinguishing fact in the case was, that when the settlor resigned as trustee she thereby cut the last thread of power which she held over the various property interests created by the trust instrument. he reacquired power she had at her death was not a power retained by her in the original declaration of trust but was given to her 'solely by virtue of the action of the other trustees and the beneficiaries'."

It was to avoid the result in *White v. Poor* in cases involving transfers made after June 22, 1936, that the provision which now constitutes § 811(d) (1) of the 1939 Code was added. But certainly the fact (if it is a fact) that other persons could enact an amendment of the trust to cut off the existence of the power of the grantor to remove a trustee is not the legal equivalent for purposes of *White v. Poor* (this being a trust created prior to June 22, 1936) of their having granted the power merely by reason of their failure to repeal it.

But appellants maintain that Article Nineteenth was in fact repealed and superseded by the amendment of the trust in 1946. An examination of the effect of that amendment, which is shown by the foregoing quotation of Article Nineteenth, however, shows that the only changes made

in that Article were those necessary to accomplish the purpose of the 1946 amendment—that is, to transfer from the grantor to a newly created individual co-trustee the powers over investments. Except for the addition of the first paragraph in Article Nineteenth, which is not now relevant, the amendments to that Article were merely formal, textual ones. By the express terms of the amending indenture of 1946, it was indeed provided only that "Article Nineteenth shall be *amended to read* as follows:". (Emphasis added.) The 1946 amendment contained no clause to repeal the provisions of Article Nineteenth of the original trust dealing with the power of the grantor to remove a trustee and appoint a new one.

Since the grantor reserved and retained until her death this important string giving her a power over the income of the trust, it follows that the agreed value of the income of the trust should have been included in her gross estate, by virtue of § 811(d)(2) of the 1939 Code.

A judgment will be entered affirming the judgment of the District Court.

APPENDIX C.

Judgment of the Court Below.

December 12, 1958.

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By The Court:

ROGER A. STINCHFIELD,
Clerk.

By: /s/ DANA H. GALLUP,
Chief Deputy Clerk.

APPENDIX D.

Opinion of the Court Below on Petition for Rehearing.

January 6, 1959.

PER CURIAM. Taxpayers have petitioned for a rehearing upon three issues involved in our decision of December 12, 1958. On one of these issues, that opinion relied in part on our understanding that counsel had conceded the grantor's ability under New York law to appoint herself as a substitute trustee; counsel now states that no such concession was intended. We have therefore reconsidered this issue on its merits.

The trust in no way limits the freedom of the grantor to appoint anyone as trustee (or, after 1946, individual co-trustee). The grantor could, under Article Nineteenth, have directed that a trustee appointed by her serve without compensation; the dissenting opinion in *Loughridge's Estate v. Commissioner*, 183 F. 2d 294 (C. A. 10th, 1950), cert. denied 340 U. S. 830 (1950), which is the only authority casting doubt on the breadth of her discretion which we have found or to which we have been cited, is thus distinguishable. In the absence of any indication to the contrary, we must hold that New York would follow the generally accepted rule that the settlor may make herself a trustee. See Restatement, Trusts § 100 (1935).

The other points raised were fully and very ably briefed and argued by counsel and were disposed of in our opinion of December 12, 1958.

An order will be entered denying the petition for rehearing.

APPENDIX E.

Order of the Court Below Denying Petition for Rehearing.

January 6, 1959.

It is ordered that the petition for rehearing, filed by appellants on December 29, 1958, be, and the same hereby is, denied.

By The Court:

/s/ ROGER A. STINCHFIELD,
Clerk.